

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

NABISCO BRANDS, INC., and BRAND
ASBESTOS CONTROL COMPANY, INC.,

Appellants,

v.

PUGET SOUND AIR POLLUTION CONTROL
AGENCY,

Respondent.

PCHB NO. 86-171

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter involves an appeal by Nabisco Brands, Inc., ("Nabisco") and Brand Asbestos Control Company, Inc. ("Brand"), contesting a \$1,000 fine issued by Puget Sound Air Pollution Control Agency ("PSAPCA") for alleged violations on June 17, 1986, of Sections 10.04(b)(2)(iii)(A), (B) and (C) and 10.05(b)(1)(iv) of Regulation 1 in the removal of asbestos material. (Notice and Order of Civil Penalty No. 6488).

The Pollution Control Hearings Board ("PCHB") held a formal hearing on February 5, 1987. Board Members present were Judith A.

1 Bendor (Presiding), Lawrence J. Faulk (Chairman), and Wick Dufford.
2 Attorney Susan Angele represented appellant Nabisco; John T. Moynihan,
3 Vice-President, represented appellant Brand. Attorney Keith D.
4 McGoffin represented respondent PSAPCA. Court reporter Lisa Flechtner
5 of Gene Barker and Associates recorded the proceedings.

6 Witnesses were sworn and testified. Exhibits were admitted and
7 examined. Argument was heard; memorandum received and reviewed.

8 From the foregoing, the Board makes these

9 FINDINGS OF FACT

10 I

11 The Puget Sound Air Pollution Control Agency is an activated air
12 pollution control authority under the terms of the State of Washington
13 Clean Air Act. PSAPCA has filed with the Board a certified copy of
14 its Regulations I and II, of which the Board takes official notice.

15 II

16 Nabisco Brands, Inc., is located in East Hanover, New Jersey, and
17 has sales and distribution offices in the State of Washington. It
18 owned the facility in Sumner, Washington, where the asbestos removal
19 work at issue was done, and hired Brands Asbestos Control Company,
20 Inc. to do that work. Brand does business in the State of
21 Washington. Its corporate offices are located in the State of
22 Illinois. Brand has been engaged in asbestos removal for eight years,
23 and has had over 1,000 removal projects nation-wide.

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1 III

2 Asbestos is classified federally as a "hazardous air pollutant."

3 The term describes a substance which

4 causes, or contributes to, air pollution which may
5 reasonably be anticipated to result in an increase in
6 mortality or an increase in serious irreversible, or
incapacitating reversible, illness. Section 112(a)(1),
Federal Clean Air Act.

7 Asbestos, then, is a very dangerous material. It is subject to a
8 special set of work procedures and emission limitations called National
9 Emission Standards for Hazardous Air Pollutants under Section 112 of
10 the Federal Act. The threshold for regulation is any material
11 containing more than one (1) percent asbestos.
12

13 IV

14 At appellants' request a pre-removal meeting was held with PSAPCA
15 on May 19, 1986 to review the regulations relevant to this project.
16 All parties attended. At the meeting PSAPCA agreed to allow outside
17 storage of asbestos, which was to be properly sealed in bags and
18 labeled, until such time when a full truckload of asbestos bags was
19 ready for shipment to the approved disposal site in Arlington, Oregon.

20 V

21 The Nabisco facility, which makes yeast and vinegar, is located at
22 1115 Zehnder, Sumner (Pierce County), Washington State. The facility
23 has 43 employees who work five days a week on eight-hour shifts
24 around-the-clock. The facility consists, in part, of 60,000 square
25 feet among twelve buildings -- some of which are seventy-five to eighty

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1 years old. The violations are alleged to have occurred in the Vat
2 Building, Building Number Four, and the yard outside. The removal
3 operation, which began on May 27, 1986, was a large-scale one,
4 eventually involving over one thousand bags of asbestos, approximately
5 60 cubic yards of material, (e.g. 1,620 cubic feet).

6 VI

7 On June 17, 1986, a PSAPCA inspector did a routine follow-up
8 inspection of the facility. He was told by Brand supervisor John
9 Heritz that the project was in the re-installation phase and that he
10 had replaced Brand supervisor David Greene. Mr. Heritz was a member of
11 the insulator's union, but is not a certified asbestos worker. Mr.
12 Greene was a certified asbestos worker.

13 A certified worker employed by Brand guided the PSAPCA inspector
14 around the area where removal had occurred. He showed where asbestos
15 removal equipment was being packed-up and taken away.

16 VII

17 On the second floor of the Vat Building, the inspector took a
18 sample of loose, friable material hanging from a pipe where asbestos
19 removal had occurred. He also took a sample of friable material, which
20 appeared had once been wetted, from a door frame and a floor gate.
21 Photographs were taken. The samples were subsequently tested and all
22 contained over 1% asbestos material.

1 The area was not enclosed or contained, nor were signs were posted in
2 this building warning of asbestos removal. Other workers were seen in
3 the immediate vicinity.

4 VIII

5 The inspector also took a sample and a photograph of loose friable
6 material found in the second story of Building Number Four. Subsequent
7 tests showed it contained over 1% asbestos. While this area was also
8 not enclosed, removal had occurred via a glove bag operation which does
9 not require containment during removal. This Brand employee told the
10 inspector that the removal operation had been completed. Sealed,
11 labeled asbestos bags were outside awaiting shipment to the approved
12 Oregon disposal site.

13 Any Conclusion of Law hereinafter determined to be a Finding of
14 Fact is hereby adopted as such.

15 From these Facts, the Board comes to these

16 CONCLUSIONS OF LAW

17 I

18 The Board has jurisdiction over these parties and these issues.
19 Ch. 43.21B RCW. Respondent has the burden of proof in this case.

20 II

21 WAC 173-400-075 adopts as state regulations the National Emission
22 Standards for Hazardous Air Pollutants (NESHAPS), promulgated by the
23 United States Environmental Protection Agency. These include work
24 practice procedures for handling asbestos.

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1 PSAPCA has adopted equally or more stringent asbestos handling
2 regulations in Article 10 of Regulation I.

3 III

4 Notice and Order of Civil Penalty No. 6488 asserts that appellants
5 violated Regulation I on or about June 17, 1987, as follows:

- 6 A. Section 10.04(b)(2)(iii) A, for failure to adequately
7 wet asbestos to ensure it remains wet until collected
8 for disposal;
- 9 B. Section 10.04(b)(2)(iii) B, for failure to collect
10 removed asbestos for disposal at the end of the
11 working day;
- 12 C. Section 10.04(b)(2)(iii) C, for failure to contain
13 removed asbestos at all times in a controlled area
14 until transported to a waste disposal site;
- 15 D. Section 10.05(b), for failure to seal removed
16 asbestos in leak-tight container while wet.

17 IV

18 The Washington Clean Air Act and regulations adopted pursuant to
19 its terms are enforced on a strict liability basis. The absence of
20 knowledge or intent does not operate to excuse violations. Kamloops
21 Investment Corporation v. PSAPCA, PCHB No. 86-100 (September 29,
22 1986). Parties are jointly liable. Id. The duty of compliance is
23 non-delegable.

24 V

25 We conclude that appellants violated Section 10.04(b)(2)(iii)(A).
26 The asbestos material removal aspect was completed. "Collected for
27

1 disposal" is a defined term meaning sealed in a leak-tight, labeled
2 container while wet. Regulation I, Section 10.02(h). The discovery of
3 loose dry asbestos after removal operations were conducted violates the
4 requirement to keep asbestos wet until sealed in a disposal container.

5 VI

6 Section 10.04(2)(iii)(C) was also violated. By June 17th asbestos
7 removal operations were complete. Containment and asbestos removal
8 equipment had been taken away. Warning signs regarding the ongoing
9 project were not posted at all entry points. (See Findings of Fact VI
10 - VIII). Friable asbestos was left around two buildings which were not
11 maintained as "controlled areas." A "controlled area" is defined as an
12 area to which only certified asbestos workers have access. Regulation
13 I, Section 10.02(i).

14 VII

15 We conclude, however, that Section 10.04(b)(2)(iii)(C) of
16 Regulation I was not violated by the storage of sealed bags
17 out-of-doors on the plant site. PSAPCA personnel had given Brand
18 permission to store the bags outside, after Brand had expressed concern
19 about storing them inside buildings near where food processing was
20 occurring. The agency is estopped from asserting a violation for
21 actions in accordance with its express permission.

22 VIII

23 We conclude that the agency did not prove violations of Section
24 10.04(b)(2)(iii)(B) or Section 10.05(b)(1)(iv). We do not know whether
25

1 the asbestos material found on June 17, 1987 was collected for disposal
2 at the end of the working day on which the inspector found them. See
3 Savage Enterprises v. PSAPCA, PCHB 86-101 (April 17, 1987). Likewise,
4 we do not know whether that asbestos was ultimately wetted and sealed
5 in a leak tight container while wet, prior to being transported to a
6 disposal site. We have previously determined that Section
7 10.05(b)(1)(iv) represents a separate work standard, a different stage
8 in the overall asbestos job, from that required by Section
9 10.04(b)(2)(iii)(A). See, McFarland Wrecking Corporation v. PSAPCA,
10 PCHB No. 86-159 (April 20, 1987).

11 IX

12 The prime purpose of civil penalties is to influence the future
13 behavior of the perpetrators and the public at large, to promote
14 compliance. Kamloops, supra. The reasonableness of penalties is based
15 on multiple factors, including: (1) the nature of the violations; (2)
16 the maximum amount of penalty possible; (3) the violators' prior and
17 subsequent behavior.

18 Given the aforementioned factors, we conclude that the \$1,000
19 penalty is appropriate, but \$250 should be suspended. Two violations
20 of work rules involving a hazardous substance occurred in two separate
21 buildings to which workers had access. On the other hand, on this
22 record appellants have no prior history of violation, and they
23 expeditiously worked to rectify the June 17 problem.

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ORDER

THEREFORE, the Order is AFFIRMED in part, and the penalty is AFFIRMED at \$1,000, with \$250 suspended upon condition that no appellant violates Washington State or local air authority asbestos rules within the next year.

SO ORDERED this 5th day of November, 1987.

POLLUTION CONTROL HEARINGS BOARD


JUDITH A. BENDOR, Presiding

 11/5/87
LAWRENCE J. FAULK, Chairman


WICK DUFFORD, Member